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possession. *Wood* v. *Weire* (Ky. 1845) 5 B. Mon. 544. It has been held that he need not go upon the property nor see it. *Perrin* v. *Leverett* (1816) 13 Mass. 128; *Rodgers* v. *Bonner* (1871) 45 N. Y. 379. And, unlike personal property, attached realty cannot be relieved of the lien by any act of the officer, *Braley* v. *French* (1856) 28 Vt. 546, 552, and is said to be subject to junior levies by other officers. *Kittredge* v. *Warren* (1844) 14 N. H. 509, 522. It would seem therefore that in the case of real estate the levy of attachment does not give the court from which the process issues possession or custody. *Heidritter* v. *Oil Cloth Co.* (1884) 112 U. S. 294; In re *Hall* (1896) 73 Fed. 527. But see *So. Bk. & Trust Co.* v. *Folsom* (1896) 75 Fed. 929.

Expressions may be found to the effect that the principles of comity which arise in this connection are based upon the fact of the court's jurisdiction. *Covell* v. *Heyman*, supra. But in view of the purpose of such principles and the rules of procedure that have been adopted under them, the position that the root idea is not jurisdiction but possession appears to be the better. *Buck* v. *Colbath* (1865) 3 Wall. 334; *Wiswall* v. *Sampson* (1852) 14 How. U. S. 52. A practical result of this position is to vest in the court first obtaining possession, not only the right to dispose of the property subject to pre-existing liens upon it, but the right to adjudicate the validity of the liens themselves. The general right of a court to regulate and pass upon its own process as a necessary part of its jurisdiction is well recognized. *Freeman* v. *Howe*, supra. Yet it does not seem possible to escape the conclusion that the court first acting must give way in this respect where its act does not involve possession of the property in question. In re *Hall*, supra. While the importance of this as between state and federal courts is minimized by the fact that the latter in issuing process are governed by the state laws, U. S. Rev. Stat. (1872) § 915, and follow the state courts where possible in interpretation and practice, *Rice* v. *Commission Co.* (1895) 71 Fed. 151, it is interesting as an apparent exception to the general rights of priority recognized in conflicts of jurisdiction.

STATE CONTROL OF NON-NAVIGABLE WATERS.—The question of the control of a state over non-navigable waters flowing entirely within its boundaries has lately been presented in New Jersey. *McCarter, Atty. Gen.* v. *Hudson County Water Co.* (1905) 61 Atl. 710. The defendant company chartered in New Jersey, was pumping water out of the Passaic river and transporting it by pipes into New York, contrary to a statute of New Jersey. The defendant contended that the statute was void as being in violation of the constitutional guarantees of property and a regulation of interstate commerce. The court placed its decision upon the novel ground that the state, owning the bed of a navigable portion of the river further down, was entitled to riparian rights and consequently could insist upon having the waters of the river come down undiminished except by the lawful use of the upper riparian proprietors. The case really involves the larger principle of the right of a state by legislation to prevent the taking of water from a stream and the transportation of it into another state, the

stream being navigable in its lower courses and flowing wholly within the state.

On the question thus raised there is but little authority. *Howell* v. *Johnson* (1898) 89 Fed. 556, doubts the existence of any property right in the state such as would entitle it to regulate the use of its non-navigable streams, although the case was decided on the ground that a vested right in the individual arose upon a grant by the general government. See *Lamson* v. *Vailes* (1900) 27 Colo. 201. It has also been suggested that a state could prevent the removal of the bed of a river from its jurisdiction by invoking the principle of state ownership of water, propounded in its constitution. *Bigelow* v. *Draper* (1896) 6 N. D. 152. But it would seem dangerous to found the state's right to control its non-navigable waters on the theory of state ownership, because of the difficulty of defining the nature of such a property right. It is said that where the stream is navigable, the state by virtue of ownership of the bed holds the water as state property in trust for the public. *Cobb* v. *Davenport* (1867) 32 N. J. L. 369. But if the stream were non-navigable throughout, and its banks and bed the subject of private ownership, we take it that the sum of the riparian rights would amount to ownership in the riparian owners, and that the state would have no right to interfere as having any property in the water. Tiedeman Lim. of Police Power § 125. Even where the states have announced the public ownership of non-navigable streams, Colo. Const. Art. 16, § 5; N. D. Const. § 210; Wy. Const. Art. 8, § 1, such ownership is construed so as not to interfere with vested riparian rights, *Bigelow* v. *Draper*, supra, and is also subject to the right of the federal government to protect navigation below. *U. S.* v. *Rio Grande Irrigation Co.* (1899) 174 U. S. 690. And in view of the doctrine of undivided sovereignty in the people of the United States, it is doubtful if the state governments have any more property in the water of the state than in the land. But see *McCready* v. *Virginia* (1876) 94 U. S. 391, as to views upon state property.

A far simpler basis on which to found the right of a state to control the waters within its confines, is the police power. By its preamble, the statute in question purports to be enacted in the exercise of this power of the state, and it is clearly within the scope of such power. A state may legislate in behalf of the public health to prevent the pollution of its streams. *State* v. *Wheeler* (1882) 44 N. J. L. 88; *State* v. *Griffin* (1896) 69 N. H. 1. A fortiori it should have power to conserve the streams themselves for a proper water supply and in the interests of navigation. Granted even that the water becomes personalty on the exercise of riparian rights, as where there is no lower proprietor, or under the law of appropriation, as in the irrigation states, *Vernon Co.* v. *Los Angeles* (1895) 106 Cal. 237, 256, the state may annex conditions to its use in the exercise of the police power just as it may annex conditions to the ownership of game reduced to possession. *White* v. *Canal Co.* (1896) 22 Colo. 191; *Canal Co.* v. *Southworth* (1889) 13 Colo. 111; *Amer. Exp. Co.* v. *Illinois* (1890) 133 Ill. 649. In short, it may well seem that the control of a state over its non-navigable waters is merely co-extensive with a proper exercise of the police power. Nor would this control

be any greater in those western states claiming ownership of the water by their constitutions, for it does not appear that they could establish property rights in the water any more than they could in the land in the absence of a special grant by the United States.

THE EFFECT OF INSANITY UPON CONTRACTUAL POWERS.—The rights and obligations created by a contract, one of the parties to which was insane at the time of its making, was raised in a recent case in Alabama. The payee of a promissory note after becoming insane transferred it to the plaintiff. In a suit against the maker it was held for the defendant on the ground that the plaintiff had no interest therein, an insane person being incapable of making a contract. *Walker* v. *Winn* (1905) 39 So. 12.

This view recognizing the necessity of mental capacity in the creation of a contract, is logically unimpeachable and has been followed in some jurisdictions in this country. *Dexter* v. *Hall* (1872) 15 Wall. 9; *Ger. S. & L. Soc.* v. *DeLashmutt* (1895) 67 Fed. 399; *Van Deusen* v. *Sweet* (1873) 51 N. Y. 378; *Farley* v. *Parker* (1876) 6 Ore. 105; *Eider* v. *Schumacher* (1893) 18 Colo. 433. The weight of authority in this country, however, is undoubtedly in favor of the position that contracts made by an insane person before formal adjudication of insanity, are merely voidable and are binding upon the parties until the insane person or his representative takes steps to disaffirm them. Parsons on Contracts, 8th ed., 422–3.

The American jurisdictions in adopting this position have disregarded entirely the rule of the common law to the effect that the deed of a person non compos was void. *Thompson* v. *Leach* (1697) 3 Salk. 300; *Yates* v. *Bowen* (1739) 2 Strange 1104. On the other hand they have extended the holding that the effeofment of an insane person was voidable rather than void, *Beverley's Case* (1602) 4 Co. 123b, first to deeds, *Allis* v. *Billings* (Mass. 1843) 6 Metc. 415, and thence to contracts in general. *Carrier* v. *Sears* (Mass. 1862) 4 Allen 336. A statement in 2 Black Comm. 291 has been supposed to support this view but has been severely criticised. 2 Sugden on Powers, 6th ed., 195. The fact that the essence of the old act of feoffment lay in the symbolic divestiture and transfer of seisin by physical act and that no question of mental capacity was involved, would seem to account for the distinction made by the common law between the deeds and the enfeoffments of one insane. The effort to apply this conclusion to the deeds of to-day, having regard to the modern conception of the function of a seal, would seem indefensible. In re *De Silver* (Pa. 1835) 5 Rawle 110.

A common resort of the courts in seeking support for the illogical position under consideration is to insist upon the analogy between the contracts of infants and those of insane persons on the basis that both are wanting in capacity to make a binding contract. Lord Mansfield in *Zouch* v. *Parsons* (1765) 3 Burr. 1794, 1807, repudiated this analogy and its later pursuit has led the courts into many inaccuracies. 4 COLUMBIA LAW REVIEW 433. An infant may have the mental capacity to contract and his contracts are held voidable, not because he has no mind, as is the case with one insane, but for the protection which the law presumes him to need. *Robinson* v. *Weeks* (1868) 56 Me. 102, 107. See the dissenting opinion of Cole, J., in